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The Incompatibility of Droit de Suite with Common Law Theories of Copyright

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Cover Page Footnote

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The Incompatibility of Droit de Suite with Common Law Theories of Copyright

Alexander Bussey*

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INTRODUCTION

In 1973, Sotheby Park Bernet (now Sotheby's) auctioned off fifty works from famed New York City taxi magnate Robert Scull's art collection.¹ The auction realized well over two million dollars in sales—the highest price of \$240,000 going to Jasper Johns' *Double White Map*.² But the most notable sale might have been Robert Rauschenberg's *Thaw*, which Scull purchased from well-known art dealer Leo Castelli for \$900 many years prior.³ *Thaw* sold for \$85,000—a 9400% gain.⁴ The sale upset the artist, who happened to be present during the auction, and prompted him to confront Scull and yell, "I've been working my ass off for you

¹ See Baruch D. Kirschenbaum, *The Scull Auction and the Scull Film*, 39 ART J. 50, 50 (1979).

² See *id.*

³ See John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 110 (1993).

⁴ See *id.*

to make all that profit.”⁵ From that point on, Rauschenberg became a strong proponent of droit de suite,⁶ or artist’s resale royalty rights—a right giving the artist a share in the proceeds when his or her artwork is resold on the secondary market—and he would see some success when in 1976 droit de suite legislation eventually passed in California.⁷

More recently, droit de suite has garnered increased attention. Late in 2011, several lawsuits were filed in California based on various auction houses’ failure to pay artists in accordance with the state’s droit de suite statute.⁸ In December 2011, both houses of the U.S. Congress introduced legislation⁹ that would implement a federal droit de suite similar to those found in Europe.¹⁰ Finally, on January 1, 2012, Great Britain fully implemented its 2006 droit de suite statute for the estates of deceased artists in order to comply with a 2001 European Union directive requiring all member states to implement such laws.¹¹

Although proponents have recently been attempting to strengthen the right of droit de suite globally, all laws based on the right are flawed—so much so that further implementation would have almost none of the positive effects that its sponsors hope for. This is to say that droit de suite, which is meant to protect young artists,¹² actually discourages the creation of art by young artists,

⁵ See *id.* Some sources say Rauschenberg actually physically assaulted Scull. See Kirschenbaum, *supra* note 1, at 51.

⁶ See Merryman, *supra* note 3, at 110.

⁷ See Cal. Civ. Code § 986 (West 2012), *invalidated by* Estate of Graham v. Sotheby’s Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

⁸ See, e.g., *Estate of Graham*, 860 F. Supp. 2d at 1117; Sam Francis Foundation v. eBay Inc., 2:11-cv-08622-JHN-PLA (C.D. Cal. Oct. 27, 2011).

⁹ S. 2000, 112th Cong. (1st Sess. 2011); H.R. 3688, 112th Cong. (1st Sess. 2011).

¹⁰ See *infra* notes 38–40 and accompanying text.

¹¹ See Henry Lydiate, *Artists Resale Right: 4th Year Report*, ARTQUEST (2010), <http://www.artquest.org.uk/articles/view/artists-resale-right-4th-year-report#> (stating that 2010 was the fourth anniversary of the UK’s *droite de suite* law, the Artist’s Resale Right).

¹² Throughout this article, I use the term “young artists” to refer to visual artists who have not yet gained wide acceptance of their work throughout the art world. That is, “young artists” may or may not be younger than their peers, but there is likely no market for their work on the resale market where droit de suite income is derived. This term would include artists such as Jean Francois-Millet, discussed *infra* in Part I.A, whose

and reduces the amount of money an artist can make from a sale. Furthermore, droit de suite conflicts with basic common law notions of copyright and property and is incompatible with standard theories of intellectual property law.

This paper discusses how droit de suite works in practice, providing a detailed analysis of its failures and an explanation of why attempts to further promulgate the right in common law nations should be quashed. Part I provides a history of droit de suite followed by a general overview of the contemporary art market and an explanation of the droit de suite directive in effect in Europe. Part II analyzes the EU droit de suite directive and discusses its justifications, how it works in practice, and who benefits, with an emphasis on the fact that it fails to achieve its goals. Part III explains why droit de suite should not be further promulgated throughout the world. This Part also addresses a number of policy concerns that should discourage further droit de suite implementation, and then discusses the three major theories of copyright and the incompatibility between droit de suite and each theory, in an attempt to bolster opposition to further implementation of droit de suite.

I. A BRIEF HISTORY OF DROIT DE SUITE AND ART MARKETS

A. *History of Droit de Suite*

Droit de suite literally means “follow-up right,” but is more generally understood as an artist’s resale royalty right, which provides the artist with a certain percentage of the sale price when his work is resold on the secondary art market.¹³ The right is considered by many to be a moral right because it is inalienable and unwaivable, and because it is often justified through the personhood theory of copyright, which suggests that the creator of a work never really gives up all of the property interests in the

work had not yet caught on but would eventually, as well as artists whose work is sold from time to time but will never gain wide appreciation and success.

¹³ See *infra* notes 53–59 and accompanying text.

work, as it is actually a part of the creator's personhood.¹⁴ At the same time, however, some argue *droit de suite* is more like an economic right because it simply provides a pecuniary benefit to the artist.¹⁵ Whichever it is, *droit moraux* or *droit patrimoniaux*, the artist's resale royalty right developed out of the France's original version of copyright, or *droit d'auteur*, which was born during the French Revolution.¹⁶

1. Moving Out of Patronage

From before the Renaissance until roughly the seventeenth century, artists worked solely as patrons of the Church or the State and they were compensated as laborers.¹⁷ But by the eighteenth century, artists were recognized as intellectual workers who "needed legal protection in order to dedicate themselves to their work for 'the best interest of the public.'"¹⁸ This idea led to the development of *droit d'auteur*, which granted playwrights, writers, and artists the exclusive rights of performance and reproduction for the duration of their lives plus a number of years beyond the author's death.¹⁹ However, French courts began to recognize the additional rights of disclosure, attribution, integrity, and retraction based primarily on the idea that authors' creations are a part of their personhood and augmented these laws.²⁰

¹⁴ See Diane B. Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19, 21–22 (1966).

¹⁵ See *id.* at 22.

¹⁶ See LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 1* (Louise-Martin-Valiquet trans., 1991); see also Michael B. Reddy, *The Droit de Suite: Why American Artists Should Have the Right to a Resale Royalty*, 15 LOY L.A. ENT. L. REV. 509, 513 (1995).

¹⁷ PIERREDON-FAWCETT, *supra* note 16, at 1.

¹⁸ *Id.*

¹⁹ See *id.* at 1 n.1 ("The Law of January 19, 1971 grants to playwrights, for their entire life, and to their heirs, for a period of five years after their death, the exclusive right to have their works performed. The Law of July 19, 1973 grants to writers and artists an exclusive right to have their works reproduced. The same right is given to their heirs for a period of ten years after their death.").

²⁰ See Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 372–80 (1998).

2. Additional Protection for Visual Artists

By the beginning of the twentieth century, scholars began to recognize that visual artists did not benefit from the *droit d'auteur* to the same degree as other authors such as writers and composers.²¹ This assumption laid the foundation for the *droit de suite* discussion. Gone were the days when artists could rely on patronage from the Church and State for their livelihoods. Artists necessarily had to earn a living by selling their artwork to collectors; but “greedy” dealers often took them advantage of them.²² Proponents of the *droit de suite* would cite lamentable cases of artists living in ruin while dealers made extraordinary profits on certain sales. One famous example is that of Jean-Francois Millet’s *Angelus*. While Millet’s heirs lived on the streets selling flowers to survive,²³ an art dealer, who had purchased *Angelus* for 70,000 francs some years prior, sold the painting for one million francs—and Millet’s family saw none of the profits.²⁴ The French Parliament took pity on the Millets, Cezannes, and Gauguins of the world—artists who “died in misery at a time when their paintings were bringing enormous sums” for dealers—and passed *droit de suite* into law in 1920.²⁵

Droit de suite supposedly “remed[ied] the unfair plight of the artist, forced to earn a living by his work and powerless vis-à-vis a greedy dealer. It responded to the need to readjust the balance of economic forces involved.”²⁶ It would spread to Belgium one year later, and then to Czechoslovakia, Poland, Uruguay, and Italy.²⁷ Realistically, however, it was only enforced in France and Belgium.²⁸ In 1948, the Berne Convention for the Protection of

²¹ See PIERREDON-FAWCETT, *supra* note 16, at 1–2.

²² *See id.* at 2.

²³ See Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under Copyright Law*, 11 COPYRIGHT L. SYMP. 1, 1 (1962).

²⁴ See PIERREDON-FAWCETT, *supra* note 16, at 2.

²⁵ Hauser, *supra* note 23, at 2–3.

²⁶ PIERREDON-FAWCETT, *supra* note 16, at 4.

²⁷ *See id.* at 4–5 (explaining that Belgium followed suit by adopting its own version of *droit de suite* on June 25, 1921, followed by Czechoslovakia in 1926, Poland in 1935, Uruguay in 1937, and Italy in 1941).

²⁸ *See id.* at 5 (stating that although *droit de suite* was recognized in a few “scattered statutes” across a small group of countries, it was “in effect applied only in France and Belgium”).

Literary and Artistic Works was amended to allow for a droit de suite, but stopped short of making it compulsory.²⁹ The amendment did not create sufficient incentive to convince a single nation to adopt the right.³⁰ But in 1965, Germany implemented its own droit de suite statute³¹ and many European civil law nations followed suit throughout the 1970s.³²

3. Modern Droit de Suite

In 1976, California became the first U.S. state to create an artist's resale royalty right,³³ but no other U.S. state has recognized the right. After the United States took steps to become a signatory to the Berne Convention, Congress considered implementing droit de suite among other moral rights for artists.³⁴ Although a droit de suite was considered in early drafts of the Visual Artists' Rights

²⁹ See Berne Convention for the Protection of Literary and Artistic Works art. 14ter, Sept. 9, 1886, *as amended* Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention] ("The [droit de suite] may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.").

³⁰ See PIERREDON-FAWCETT, *supra* note 16, at 5.

³¹ See *id.* at 229 (Art. 26 of Germany's Act Dealing with Copyright and Related Rights of September 9, 1965 states "should the original of an artistic work be resold or should such resale involve an art dealer or auctioneer as purchaser, vendor or agent, the vendor shall pay the author a participation at the rate of one per centum of the sale price. There shall be no obligation if the sale price is less than five hundred German marks.").

³² See *id.* at 6 (explaining that "since 1965, the droit de suite has found a second wind: an increasing number of countries, now totaling 28, have incorporated it into their statutes").

³³ See Cal. Civ. Code § 986 (West 2012), *invalidated by* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012). California's droit de suite statute provides for a five percent royalty on all sales of \$1000 or more subsequent to the original sale with no maximum royalty. See *id.* The statute has proven difficult to enforce, however, as is evidenced by the recent lawsuits filed in California. See cases cited *supra* note 8 and accompanying text. In *Morseburg v. Baylon*, 621 F.2d 972, 978 (1980), California's droit de suite statute was found to be not preempted by the copyright act of 1909, but no challenges had been brought against the law as to its validity under the Copyright Act of 1976 until 2012 when a California district court found the law in violation of the dormant commerce clause at least as it is applied to artwork out of state. See Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d. 1117, 1126 (C.D. Cal. 2012).

³⁴ See *Visual Artists Rights Act of 1987: Hearing on H.R. 3221 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 81-82 (1988) (statement of R. Frederick Woolworth, President, Art Dealers Association of America).

Act of 1990, the final bill passed without a resale royalty right,³⁵ merely prompting the U.S. Copyright Office to perform a study on the feasibility of implementing such a right for U.S. artists.³⁶ The Copyright Office concluded that *droit de suite* should not be implemented in the United States, but that it would reconsider such a conclusion if Europe implemented the right more broadly.³⁷

In 2001, the European Union passed a directive requiring all member states to partially implement a *droit de suite* by 2006, with full implementation required by 2012.³⁸ As the global trend seems to be moving in the direction of maintaining a *droit de suite*, Congress has once again proposed bringing it to the United States. In late 2011, bills were introduced in both the Senate and the House that would require a seven percent royalty on auctions of visual art exceeding \$10,000.³⁹ Half of the royalty would go to the artist or her heirs, while the other half would be deposited into an account established “for the purposes of funding purchases by nonprofit art museums in the United States of works of visual art authored by living artists domiciled in the United States.”⁴⁰

B. The Global Contemporary Art Market

1. Impressionism to Contemporary Art

The contemporary art market has changed significantly since the days of the “greedy” dealers who supposedly took advantage of French Impressionists.⁴¹ Prior to the 1950s, Paris was still the

³⁵ See 17 U.S.C. § 106A (1994).

³⁶ See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 608(b), 80 Stat. 5089 (1990).

³⁷ See U.S. COPYRIGHT OFF. REG. OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY 149 (1992) (explaining that “the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish *droit de suite* in the United States. . . . Should the European Community harmonize existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States”).

³⁸ See Council Directive 2001/84, 2001 O.J. (L 272) 32 (EC).

³⁹ See S. 2000, 112th Cong. (1st Sess. 2011); H.R. 3688, 112th Cong. (1st Sess. 2011).

⁴⁰ See S. 2000, 112th Cong. (1st Sess. 2011).

⁴¹ See *supra* notes 21–25 and accompanying text.

center of the contemporary art world.⁴² At the beginning of the twentieth century, when droit de suite first became law in France, Impressionist painters were not allowed in the salons—the official art exhibitions of the *Société des Artistes Français* in Paris.⁴³ The emerging bourgeoisie (young and newly rich businessmen) had a desire to buy art, but likewise were prohibited from participating in the art establishment, which was controlled by old money.⁴⁴ Some art dealers took advantage of this situation by purchasing art from poor artists who were willing to sell their paintings for bargain prices directly to the dealers, who would occasionally turn extraordinary profits.⁴⁵ But the art dealers did not simply buy the art and sell it—they also had to convince the bourgeoisie that it was a worthy investment. Dealers and critics were able to leverage social, political, and economic structures to develop a completely new market for art that artists likely would not have been able to create for themselves. Somewhat ironically, without the very dealers who supposedly used artists' unfavorable positions for their own gain, there might never have been a market for the artists' work at all.⁴⁶

After World War II, New York City's transition from a cultural follower to a cultural leader began with the art movement of abstract expressionism.⁴⁷ Much like in France, contemporary art in New York attracted new buyers looking for both status symbols and investments. Before the war American art was bought mostly by people with old money, but between 1940 and 1985 young entrepreneurs and business corporations became common buyers.⁴⁸ The old collectors were very hesitant to sell their art, but these new

⁴² See Nobuko Kawashima, *The Droit de Suite Controversy Revisited: Context, Effects and the Price of Art*, 3 INTELL. PROP. Q. 223, 233 (2006) (discussing that the commercial market of artworks made by living artists emerged also in Paris during the late nineteenth century); see also DIANA CRANE, *THE TRANSFORMATION OF THE AVANT-GARDE: THE NEW YORK ART WORLD, 1940–1985* 1 (1987) (citing Seuphor, a French art critic, who discussed that before the 1950s “nearly all the original conceptions came from Paris”).

⁴³ See Kawashima, *supra* note 42, at 233.

⁴⁴ See *id.* at 233–34.

⁴⁵ See PIERREDON-FAWCETT, *supra* note 16, at 2–3.

⁴⁶ See Kawashima, *supra* note 42, at 233.

⁴⁷ See *id.*

⁴⁸ See *id.* at 234.

buyers were much more willing to sell in order to make profits or to improve their collection.⁴⁹

With this change, the modern contemporary art market was born. Sotheby's and Christie's, two of the biggest auction houses, began to hold regular contemporary art auctions. Buying art started to be seen as an investment, albeit a risky one: much of the money coming into the art market came from speculators and art investment funds.⁵⁰

But the modern art market is a sophisticated machine with many more players than just artists and buyers. As Professor John Henry Merryman, a chief opponent of *droit de suite*, puts it:

The main components of the art world, in addition to artists, are dealers and auctioneers, collectors, museums and their professional personnel, art historians, and art critics and the art press. Within the art world, the art market is the principal medium for the distribution of art and the compensation of artists. The art world has an ecology, its own set of inner relationships and interdependencies. As in other ecologies, what affects one part resounds throughout the system and is felt by all the others.⁵¹

Accordingly, the value of art is dependent on many variables. While the quality of a painter's craft is important, it also matters what the art press says about the art, where it is being exhibited, and who is buying it, for example.

2. Primary and Secondary Art Markets

The contemporary art market operates in two interdependent spheres: primary and secondary sales. Primary sales take place, for the most part, in galleries and at art fairs, while secondary sales mostly occur at auctions.⁵²

⁴⁹ *See id.*

⁵⁰ *See id.* (stating that the Robert Scull sale "is said to have been a watershed for the market of contemporary art, opening the gates to speculative investments in art").

⁵¹ Merryman, *supra* note 3, at 105.

⁵² *See id.* at 105–06.

The primary art market no longer pits dealers against artists—today’s gallery model has changed significantly since the “greedy” dealers were profiting off of Impressionist masters in the first few decades of the twenty-first century. Modern galleries work on a consignment basis.⁵³ Dealers take a commission from sales of art—often as much as fifty percent—but this means that the dealer benefits from a higher price just as the artist does, so there is no incentive to pay the artist less than the work is worth. Moreover, dealers do not simply take an artist’s work and wait for the buyers to walk in. The dealer spends much time promoting his artists—usually through gallery exhibitions—and he must take a large risk by investing money up front for expenses such as storage, rent, advertising, and sometimes advances on future commissions to artists.⁵⁴ The result is that contemporary art dealers are actually “genuinely interested in and capable of supporting and promoting the artist’s work”⁵⁵ and have an interest in seeing the artist succeed as the “caretakers of artists’ careers.”⁵⁶ The bottom line is that the dealer’s interests are no longer adversarial to those of the artists—the dealer only gets rich if the artists get rich.

The secondary art market is almost exclusively beneficial to work by artists who have already shown themselves to be a success on the primary market. According to Merryman, only two or three hundred of the hundreds of thousands of working artists in America have a significant secondary market for their work.⁵⁷ This secondary market is heavily focused in New York City. In fact, the United States accounts for over forty-three percent of the world’s contemporary art auctions, while the UK is home to thirty percent of such auctions, and France now only holds about 6.6%.⁵⁸ This disparity in market share is one of the factors that led to the

⁵³ See *id.* at 105.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ Alice Gregory, *On the Market: Sotheby’s. New York. 2009–Present*, 13 N+1 185, 188 (2012) (“[The dealers’] job is to develop those careers, and to establish relationships with buyers whose past purchasing habits show discernment.”).

⁵⁷ Merryman, *supra* note 3, at 106.

⁵⁸ See Kawashima, *supra* note 42, at 237 (stating the countries’ percentage of share and comparing them through an elaborated table titled “Table 1 fine art auction sales by country: 2003/2004 season”).

EU's droit de suite directive in 2001: nations that had previously not implemented a droit de suite—including the U.S. and UK—controlled a great majority of the world's secondary market sales of contemporary art.⁵⁹

C. Overview of Directive 2001/84/EC

1. Application of Droit de Suite

With the disparity of market share of contemporary art sales in mind, the European Union passed its droit de suite directive in 2001.⁶⁰ The EU droit de suite applies to “graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.”⁶¹ The directive imposes a tiered royalty scheme that ranges from four percent of the sale price up to the first €50,000 to 0.25% for the sale price above €500,000, with a maximum royalty of €12,500.⁶² The term of the resale royalty right is tied to the length of copyright, so it currently lasts for the life of the artist plus seventy years.⁶³ The directive also allows for collective management organizations to collect the royalties and find the artists to whom they belong.⁶⁴ Importantly, the resale royalty right is inalienable and unwaivable, so even if the artist transfers her copyright to a third party, she still retains her resale royalty right.⁶⁵

The directive required each Member State to implement a droit de suite law benefitting artists and their heirs by 2006,⁶⁶ but it

⁵⁹ See Council Directive 2001/84, 2001 O.J. (L 272) 32, 32 rec. 7, 8, 9 (EC) (“This right is therefore a factor which contributes to the creation of distortions in competition as well as displacement of sales within the Community.”).

⁶⁰ See *id.*

⁶¹ Council Directive 2001/84, art. 2, 2001 O.J. (L 272) 32, 35 (EC).

⁶² See *id.* art. 4, at 35. The directive allows for minimal wiggle room here, letting member states choose the minimum price for which the right applies as long as it is below €3,000. It also allows the member states to set the highest royalty rate at five percent rather than four percent, but still sets the maximum royalty at €12,500. *Id.*

⁶³ *Id.* art. 8, at 35; rec. 7, at 33.

⁶⁴ *Id.* art. 6, at 35.

⁶⁵ *Id.* art. 1, at 34.

⁶⁶ *Id.* arts. 10, 12, at 36.

allowed countries like the UK, which did not already have a law in place to implement the Directive on a longer timeline.⁶⁷ Accordingly, the UK did not fully implement the directive until 2012.⁶⁸ Choosing to adhere to the longer deadlines, they applied the law to living artists in 2006, and expanded it to their heirs in 2012.⁶⁹

2. Legal Justifications for the Directive

In the recitals set forth before the directive's adoption, the European Union had articulated moral and legal justifications for its enactment. First and foremost, the droit de suite directive is a harmonization initiative.⁷⁰ Recital 15 states:

In view of the scale of divergences between national provisions it is therefore necessary to adopt harmonising measures to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. It is not however necessary to harmonise every provision of the Member States' laws on the resale right and, in order to leave as much scope for national decision as possible, it is sufficient to limit the harmonisation exercise to those domestic provisions that have the most direct impact on the functioning of the internal market.⁷¹

The recitals also cite article 95 of the European Community Treaty as the legal basis for compelling member states to comply with the measure.⁷² Article 95 empowers the European Council to

⁶⁷ *Id.* at art. 8.

⁶⁸ See Chanont Banterngansha & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis*, Centre for Economic Policy Research Discussion Paper No. DP7136, 5 (Jan. 2009), available at <http://ssrn.com/abstract=1345662>.

⁶⁹ See *id.* at 3–5.

⁷⁰ See Simon Stokes, *Implementing the Artists' Resale Right (droit de suite) Directive into English Law*, 13 ENT. L. R. 153, 153 (2002).

⁷¹ Council Directive 2001/84, rec. 15, 2001 O.J. (L 272) 32, 33 (EC).

⁷² *Id.* rec. 10, at 32 ("Such disparities with regard to the existence of the resale right and its application by the Member States have a direct negative impact on the proper functioning of the internal market in works of art as provided for by Article 14 of the

administer directives that would eliminate obstacles to free trade.⁷³ Since the Council believes that the disparity between the art market in the UK and in France is at least in part due to the UK's lack of a *droit de suite*, it felt justified in passing directive as a harmonization measure. Whether *droit de suite* was actually a barrier to trade, however, is questionable.⁷⁴

A second legal justification for the directive is derived from article 12 of the European Community Treaty, which states that "all union citizens shall enjoy equal treatment with the nationals of that Member State."⁷⁵ This suggests that a Member State that offers a *droit de suite* to its citizens cannot bar EU citizens of other Member States from benefitting from such a right—even if that union citizen is from a nation that does not provide *droit de suite*. Therefore, member states could not use non-reciprocity as a bar to providing resale royalties, even though the Berne Convention allows for such a bar.⁷⁶ This justification would be equally applicable to a directive that would eliminate *droit de suite* across Europe, or one that allows states to keep their *droit de suite* royalties at a level approximating the additional expenses of exporting a work to a different country.⁷⁷

3. Moral Justifications for the Directive

The fact that the European Council opted to harmonize their laws by enacting a Union-wide *droit de suite* rather than

Treaty. In such a situation Article 95 of the Treaty constitutes the appropriate legal basis.").

⁷³ Consolidated Version of the Treaty on the Functioning of the European Union art. 95(1), May 9, 2008, 2008 O.J. (C 115) 86 [hereinafter TFEU].

⁷⁴ See Joerg Wuenschel, *Article 95 EC Revisited: Is the Artist's Resale Right Directive a Community Act Beyond EC Competence?*, 4 J. INTELL. PROP. L. & PRAC. 130, 132–34 (2009). Wuenschel presents early data that indicates that London's secondary market dominance is not shifting to other European cities after harmonization. This suggests that the barrier preventing Paris from matching the market in London is unrelated to *droit de suite*. *Id.*

⁷⁵ TFEU, *supra* note 73, at art. 12.

⁷⁶ See Berne Convention, *supra* note 29 and accompanying text.

⁷⁷ See David L. Booton, *A Critical Analysis of the European Commission's Proposal for a Directive Harmonising the Droit de Suite*, 1998 INTELL. PROP. Q. 165, 185 (1998). This would minimize the threat of dealers exporting art out of a *droit de suite* country to sell it in a non-*droit de suite* country just to save on the royalty.

eliminating the right altogether, suggests that it accepted the moral justifications for the original French droit de suite law. This is evident in the directive's reference to the inequities between artists and other authors:

The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.⁷⁸

The fact that the European Council believes that visual artists need greater economic protection suggests that the Council accepts the myth of the starving artist as a valid concern in need of a remedy.⁷⁹ However, in the contemporary art market, established artists can make lucrative amounts of money on primary market sales and, accordingly, do not need greater economic protection.⁸⁰ Therefore, the right must primarily be intended to protect those young artists who have not yet established themselves in the art world. But the value of art is in its uniqueness, whereas much of the value in literature and music is in its reproducibility, and the analogy between visual art and other creative works breaks down when it is examined with some scrutiny, as is discussed below.⁸¹

⁷⁸ Council Directive 2001/84, rec. 3, 2001 O.J. (L 272) 32, 32 (EC).

⁷⁹ See *supra* notes 21–25 and accompanying text. Alternatively, this could simply suggest that the European Council believes that all artists, regardless of their success *deserve* increased protection. Such a conclusion should require justification under either the labor theory of copyright, or the personhood theory of copyright, but both of these theories fail to justify a droit de suite as discussed *infra* in Part III.B.

⁸⁰ See Merryman, *supra* note 3, at 107, 109 (explaining that successful artists do not starve and artistic genius does not go undiscovered).

⁸¹ See *id.* at 113–15 (addressing the argument that visual artists lack the opportunity to collect royalties, in contrast to authors and composers, thus stressing the need for droit de suite).

II. DROIT DE SUITE IN PRACTICE

As of 2012, droit de suite has been fully enacted throughout the entire European Union.⁸² Yet scholars such as Merryman and others continue to argue that such a right is ineffective and unnecessary.⁸³ Now that droit de suite is in effect in London, one of the major hubs of the contemporary art market, it will become easier to examine exactly how droit de suite works in conjunction with the contemporary art market.⁸⁴ This section analyzes the current understandings of the efficacy of enforcement, the beneficiaries of the right, and the impact on markets in the UK and the United States with an emphasis on the disagreements between opponents and those who favor droit de suite.

A. *Enforcement of the Directive*

With full implementation of droit de suite now in effect in the EU, it is necessary for each country to find a way to adequately enforce the right. Administrative costs can be a great burden, so most countries have collective management agencies that take the royalties and deliver them to the artists after taking a fee.⁸⁵ This can potentially lead to issues with mismanagement and corruption. In France, there are twenty-seven different authors' societies that collect droit de suite royalties.⁸⁶ Victor Ginsburgh provides a picture of how these collecting agencies are run:

The French copyright society SPADEM faced a financial crisis in 1996 and was placed under court-ordered administration. The Tribunal noted that its

⁸² See generally Council Directive 2001/84, 2001 O.J. (L 272) 32 (EC).

⁸³ See generally Merryman, *supra* note 3 (stating that supporters of droit de suite will be "opposed by knowledgeable people who see the right as a textbook example of uninformed good intentions in support of a bad cause").

⁸⁴ See Kawashima, *supra* note 42, at 237.

⁸⁵ See Mara Grumbo, *Accepting Droit De Suite As an Equal and Fair Measure Under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive*, 30 HASTINGS COMM. & ENT. L.J. 357, 362 (2008) (discussing administrative costs of collecting royalties and the rates charged by various collection agencies).

⁸⁶ See Victor Ginsburgh, *The Economic Consequences of Droit de Suite in the European Union*, 35 ECON. ANALYSIS & POL'Y 61, 65 (2006) (discussing mismanagement of the twenty-seven French authors' societies).

running costs, in particular staff salaries, could only be paid if the money, which should be used to pay artists' dues, was drawn on. ADAMI, another French authors' society audited by the French Ministry of Finance, did not pay the royalties due to Sean Connery, Charles Bronson and Laura Antonelli because "it could not find their addresses." ADAMI also used money earmarked to promote artistic creation, to renovate its offices. SACEM, another French society, needs 1,490 employees to manage the accounts of 12,000 members The Danish society in charge of [droit de suite] takes as much as 40% of the royalty ADAGP, the French collecting agency, levies 20% before paying artists.⁸⁷

According to Ginsburgh, this data is nothing short of appalling.⁸⁸ That is not to say, however, that enforcement is a total failure—the collecting agencies have been successful in keeping auction houses accountable, much like ASCAP and BMI have been successful in enforcing the rights of recording artists and composers in the United States.⁸⁹ In 1990, over \$17 million in royalties were collected and distributed to over 1,700 artists in France alone.⁹⁰ Furthermore, collecting agencies tend to provide benefits to the art community beyond collecting and distributing royalties.⁹¹ For example, they are involved in lobbying for artists'

⁸⁷ *Id.* at 65.

⁸⁸ See Ginsburgh, *supra* note 86, at 65 (referring to mismanagement of French authors' societies as "frightening" and "wasteful").

⁸⁹ See Reddy, *supra* note 16, at 516–17 (noting that "the resale royalty is in reality only collected at auction" and that the French authors' societies are "similar to ASCAP and BMI").

⁹⁰ *Id.* at 531 ("Jean-Marc Gutton, General Manager of ADAGP, testified that more than \$17,000,000 in resale royalties were collected and distributed to more than 1700 artists in 1990.").

⁹¹ See Eliza Hall, *The French Exception: Why the Resale Royalty Works in France and Why it Matters to the U.S.*, 1 J. INT'L MEDIA & ENT. L. 321, 335–37 (2007) ("[T]hese organizations [also] function as a means of sharing the wealth generated by the music industry, providing benefits to less-successful artists that are funded by the successful artists' royalties.").

rights and they often provide grants for artists.⁹² Outside of France, however, there are not many success stories.⁹³

The EU Directive mitigates administrative costs by setting a minimum sale price for which royalties may be applied.⁹⁴ Unfortunately, however, the cost of enforcement has still been fairly significant. In a 2008 study of *droit de suite* in the UK, Toby Frauschaer concluded that the administrative cost of *droit de suite* is between €23.30 and €53.60 per sale (significantly greater than supporters' prediction that costs would be €0.50 per sale).⁹⁵

Opponents of *droit de suite* cite the inefficiencies of enforcing *droit de suite* as a reason that the right should not exist.⁹⁶ But proponents argue that poorly designed statutes create these inefficiencies, which can be ameliorated by implementing simpler collection requirements like those in France.⁹⁷ Unfortunately, it will be several years before any reliable data on the efficacy of *droit de suite* in a major contemporary art hub like London will exist.

B. Who Benefits from Droit de Suite

Until very recently, there was little to no concrete data on who would actually benefit from *droit de suite*. While the European Commission was first considering a *droit de suite* directive, some opponents suggested that it would only benefit the eight richest artists and their estates, but proponents argued it would actually

⁹² See *id.* (stating that “members of ASCAP and BMI . . . benefit from litigation and lobbying efforts whose cost would be beyond the means of the overwhelming majority of musicians and composers” and that in 2004 ASCAP put collected royalties toward grants for emerging songwriters).

⁹³ See Merryman, *supra* note 3, at 115 (observing that of the twenty-nine jurisdictions that recognize the *droit de suite* right, twenty-four apply it “little or not at all”).

⁹⁴ Council Directive 2001/84, rec. 22, 2001 O.J. (L 272) 32, 34 (EC) (stating that “minimum threshold may help to avoid disproportionately high collection and administration costs”).

⁹⁵ See TOBY FROSCHAUER, THE IMPACT OF ARTIST RESALE RIGHTS ON THE ART MARKET IN THE UNITED KINGDOM 10 (2008) (“[A]uctioneers’ calculation of the transaction costs ranged between £23.30 and £53.60, depending on whether or not they had included set-up costs.”).

⁹⁶ See Merryman, *supra* note 3, at 115 (explaining that one of the primary arguments against *droit de suite* is that it doesn’t work and most jurisdictions do not enforce it).

⁹⁷ See PIERREDON-FAWCETT, *supra* note 16, at 106.

benefit closer to 250,000 artists in Europe alone.⁹⁸ However, a study performed in 2005 suggests that between the years 2000 and 2004 only 3,876 living artists had work sold at auction worldwide.⁹⁹ During the same timeframe, the work of just slightly fewer than 10,000 deceased artists was sold at auction.¹⁰⁰ It is important to note that these data do not account for private dealer sales outside of the realm of auctions, which are still subject to droit de suite. Still, the numbers are drastically lower than the estimate calculating that 250,000 artists would benefit.

Besides being limited to a smaller number of individuals than was originally expected, the lion's share of droit de suite benefits are concentrated distinctly among a select few artists and estates. Overall, heirs of deceased artists receive around eighty-five percent of droit de suite royalties.¹⁰¹ In France, four deceased artists—Picasso, Braque, Matisse, and Leger (none of which were starving artists)—account for close to seventy percent of all droit de suite royalties.¹⁰² Opponents of droit de suite suggest that any right that so disproportionately benefits wealthy creators is undesirable.¹⁰³ Proponents counter by arguing that “it would be unreasonable to expect all fine artists to forfeit this potentially lucrative reward simply because, as in any other enterprise, those who have the greatest success will benefit the most.”¹⁰⁴ That the wealthiest artist will benefit the most is merely a “fact of life.”¹⁰⁵ Even very small royalty payments would be beneficial to artists who are struggling to make ends meet through their primary market sales.¹⁰⁶

⁹⁸ See European Commission, Proposed Directive on Artists' Resale Right—Clarification MEMO/99/68, 14 December 1999, 1 (“Within the EU as a whole, approximately 250,000 artists would benefit from the resale right. Any suggestion that the resale right would benefit only eight rich families (e.g. Picasso's heirs) is therefore inaccurate.”).

⁹⁹ Ginsburgh, *supra* note 86, at 66.

¹⁰⁰ *Id.* (“The work of 9,987 deceased artists was sold during the same period.”).

¹⁰¹ *Id.* at 66.

¹⁰² M. Franklin Boyd, Presentation on Artists' Resale Royalty Rights (Mar. 6, 2012) (slides on file with author).

¹⁰³ See Merryman, *supra* note 3, at 117.

¹⁰⁴ Reddy, *supra* note 16, at 531.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*

C. Impact in the UK

Because its strong contemporary art market dwarfs those of the rest of Europe, the United Kingdom was one of the strongest opponents to passing the EU droit de suite directive and the most stubborn when it came time to implement it.¹⁰⁷ The United Kingdom was concerned that droit de suite would harm the art market and send auction sales to countries without droit de suite, such as the United States and Switzerland. However, one recent empirical study suggests droit de suite has not had a significant impact on auction sales:

The worst predictions regarding the effect on the UK art market from the implementation of the [droit de suite] have not been realized. We have not seen a reduction in price growth for art subject to the [droit de suite] in the UK relative to other countries or other markets and we have not found evidence of a movement of paintings from the UK to other venues where the [droit de suite] would not be applied.¹⁰⁸

This report suggests that implementing droit de suite has actually had little effect on European trade.¹⁰⁹ However, the report also suggests that once droit de suite is expanded to the heirs of deceased artists, “it may become harder for buyers to ignore the impact and the [droit de suite] may increasingly be factored into their valuations,” leading to a potential drop in prices of up to twenty-four percent.¹¹⁰ Although this report suggests there has not been a shift in locations of sales, there is anecdotal evidence to the contrary. For example, in 2001, UNICEF sold the £50,000,000

¹⁰⁷ The UK implemented droit de suite for living artists in 2006, and did not provide the right to heirs of deceased artists until 2012. See Daniel Grant, “*Droit de Suite*” Debate Heats Up, ARTNEWS, Jan. 11, 2012, available at <http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up>.

¹⁰⁸ Banterghansa & Graddy, *supra* note 68, at 33.

¹⁰⁹ See *id.* This also suggests that unharmonized droit de suite laws never were an actual barrier to free trade and the harmonization element of the EC’s droit de suite directive was therefore entirely unnecessary. It is important to note, though, that this does not mean that droit de suite has not had an impact on the primary art market.

¹¹⁰ *Id.* at 34.

Gaffé collection in New York rather than France specifically so that it could avoid the droit de suite fee.¹¹¹

The impact of droit de suite might not be limited to auction sales. The interdependence of primary market sales and secondary market¹¹² sales means that the primary market should also expect to see changes with the implementation of droit de suite. One recent economic model suggests that the new droit de suite in the UK will result in less art being made.¹¹³ Under this model, droit de suite does encourage production of art among well-established artists later in their career, but only at the expense of young artists and art consumers.¹¹⁴ But droit de suite proponents argue that these models assume that collectors only buy art for investment purposes, whereas many collectors buy art purely for its aesthetic appeal.¹¹⁵

D. Droit de Suite in the United States

Despite multiple attempts at passing federal and state droit de suite legislation, the right has never been effectively enforced in the United States. Until recently, California was the only U.S. state with a resale royalty right.¹¹⁶ The California statute closely mirrored the EU Directive, but with a simpler, flat, uncapped royalty of five percent on all secondary sales of “fine art.”¹¹⁷ In May 2012, however, a California trial court ruled that the droit de suite directive violated the dormant commerce clause of the U.S. Constitution by applying outside the state of California in certain instances.¹¹⁸ Despite the fact that the statute includes a severability clause, the court ruled that the portion of the statute that applies beyond the state’s borders could not be severed and the entire

¹¹¹ Ginsburgh, *supra* note 86, at 68.

¹¹² See *supra* notes 52–59 and accompanying text.

¹¹³ See Gyu Ho Wang, *The Resale Royalty Right and its Economic Effects*, 15 J. OF ECON. RESEARCH 171, 181 (2010).

¹¹⁴ See *id.* (“[T]he resale royalty right has a harmful effect on both the consumer surplus and the social welfare.”).

¹¹⁵ See Reddy, *supra* note 16, at 529.

¹¹⁶ See *supra* notes 33–37 and accompanying text.

¹¹⁷ See Cal. Civ. Code § 986 (West 2012), *invalidated by* Estate of Graham v. Sotheby’s Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

¹¹⁸ See Estate of Graham v. Sotheby’s Inc., 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

statute was declared invalid.¹¹⁹ Pending appeal, this means there is no longer any droit de suite in the United States.

Besides violating the dormant commerce clause, the California statute has a number of other issues that some scholars suggest would make it invalid or at least ineffective even if an appeal were to successfully reverse the unseverability decision. First of all, the statute seems to be preempted by federal copyright law.¹²⁰ The Copyright Act of 1976 states that any right that falls within the general scope of copyright law is preempted by the Act.¹²¹ While it is not clear that a droit de suite would fall within the general scope of copyright law, the fact that Congress considered including the right in the Visual Artists' Rights Act (which is encoded as part of the Copyright Act),¹²² suggests that it might be. The California law has previously withstood preemption scrutiny,¹²³ but only under the Copyright Act of 1909, which did not include a preemption clause as the current act does.¹²⁴

Secondly, even if the California droit de suite were constitutional, it would be very difficult to enforce. The statute requires that in the event of a reseller's failure to comply with the law, an artist must bring a suit himself¹²⁵—something most artists cannot afford to do. Furthermore, various privacy interests of buyers interfere with the application of the statute.¹²⁶ Auction houses are notoriously secretive about buyers and sellers of fine art

¹¹⁹ See *id.* at 1126.

¹²⁰ Anandashankar Mazumdar, *Two Lawsuits by Artists May Test Validity of California Resale Royalty Rights Statute*, UCIRA, <http://www.ucira.ucsb.edu/two-lawsuits-by-artists-may-test-validity-of-california-resale-royalty-rights-statute> (last visited June 15, 2012).

¹²¹ 17 U.S.C. § 301 (2006).

¹²² See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 608(b), 80 Stat. 5089 (1990).

¹²³ See generally *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980) (This case was brought by an art dealer arguing that the California Resale Royalty Act was preempted by the 1909 Copyright Act.).

¹²⁴ See *id.*

¹²⁵ Cal. Civ. Code § 986(a)(3) (West 2012), *invalidated by* *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

¹²⁶ See generally *Estate of Graham v. Sotheby's Inc.*, 860 F.Supp.2d 1117 (CD Cal. 2012); *Francis Foundation v. Christie's Inc.* No. 2:11-cv-08605-SVW-PJW (C.D. Cal. filed Oct. 18, 2011).

so it is difficult for artists to know when their works are being sold by California residents (as is evidenced by a pair of lawsuits filed in California in 2011).¹²⁷ As a result, this droit de suite statute has generally been ineffective in the past.

In sum, because of the perceived high cost of enforcement and the skewed royalty payments that favor wealthy artists, many scholars and other opponents such as museums, dealers, and some artists argue against further implementation of droit de suite. However, proponents of the right, including established artists like Robert Rauschenberg, believe that droit de suite is favorable because the artist's own genius and reputation is the most direct cause of an increase in the value of a work sold at auction, and therefore, the artist deserves to share in that windfall.¹²⁸ This argument, coupled with anecdotes about artists such as Millet and Rauschenberg, and the desire to correct the imbalance between the economic rights in the creative work of visual artists and other authors has been sufficient to keep droit de suite expanding over the last decade. Yet as legislators and established artists continue to push for more droit de suite legislation throughout the world, scholars continue to disagree on the appeal of the right. I attempt to resolve this conflict in the next section not only through a careful analysis of policy considerations, but also a review of copyright justification theories, which until now have not been included in droit de suite discussions.

III. DROIT DE SUITE CONFLICTS WITH COMMON LAW POLICY CONSIDERATIONS AND FAILS TO COMPLY WITH COPYRIGHT THEORY

With the full implementation of droit de suite in the UK, there is now strong international pressure to expand the right globally.¹²⁹ The U.S. Copyright Office suggested reconsidering droit de suite if

¹²⁷ See Mazumdar, *supra* note 120.

¹²⁸ See Merryman, *supra* note 3, at 111.

¹²⁹ See Victoria Till, *Defeated or Deferred? Why a Resale Royalty was Rejected in Australia*, 13 INT'L J. CULTURAL POL'Y 287, 289 (2007) (quoting the English House of Commons report stating "[T]he Government should renew its efforts to achieve universal adoption of *droit de suite*, through all available international channels").

Europe implemented the right,¹³⁰ and, accordingly, the House and Senate have each proposed bills that, if passed, would implement droit de suite in the United States.¹³¹ Furthermore, in late 2011, artists in California finally started using the judicial system to fight the auction houses that were not paying out royalties in accordance with that state's droit de suite.¹³² The demise of the California statute that resulted from those 2011 lawsuits could potentially bring about louder cries for a federal law by droit de suite proponents. It seems that pressure to expand droit de suite is building and could lead to a possibility of further implementation across the globe.¹³³ But common law nations such as the United States should resist this pressure because a number of policy considerations weigh heavily against further implementation, and because such a law lacks a basis in copyright theory.

A. Policy Considerations Weigh Against Further Droit de Suite Implementation

Besides the fact that droit de suite cannot sit comfortably within any traditional justification for intellectual property rights, as will be discussed below, simple policy considerations weigh against it. For example, the resale royalty right is based on an archaic art market and unproven mythology, it contradicts the utilitarian ideals used as the basis for copyright in most common law nations, it contradicts notions of property law, and it relies on a false assumption that artists are naïve and easily taken advantage of. In addition to being an administrative burden, its benefits simply would not outweigh its costs.

1. The Art Market Has Changed Since France Originally Implemented Droit de Suite

Since the European Council chose to compel member nations to enact droit de suite laws, it seemingly accepted the original moral justification France adhered to when passing it in 1920.

¹³⁰ See U.S. COPYRIGHT OFF. REG. OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY 149 (1992).

¹³¹ See S. 2000, 112th Cong. (1st Sess. 2011); H.R. 3688, 112th Cong. (1st Sess. 2011).

¹³² See *supra* note 8 and accompanying text.

¹³³ See Till, *supra* note 129, at 289.

Therefore, one can surmise that the starving artist/greedy dealer myth—Jean-Francois Millet’s family starving while his painting *Angelus* was sold for one million francs by his dealer¹³⁴—was accepted by the Council as a moral justification for the directive (though this justification was likely secondary to the political demands of France’s secondary art market and the collective management organizations who enforce and benefit from droit de suite laws).

The reality of the myth of the starving artist is itself questionable. Even in the early twentieth century when droit de suite was initially gaining support, poor artists like Van Gogh and Gauguin were the exception, not the rule.¹³⁵ In fact, many of the best artists earned considerable wealth from their art during their lives.¹³⁶ Today, an average artist earns an income comparable to an average worker—artists are by and large not starving.¹³⁷ In fact, artists consistently earn more than other authors such as poets or playwrights.¹³⁸

Once the myth of the starving artist is shattered, it is clear that visual artists are no more deserving of additional intellectual property protections than any other creator. It makes little sense to analogize artists to recording artists and writers who make money from the royalties on the reproduction of their work. Artists make money on the sale of chattels. The value in visual art is in the unique quality of each piece. Each individual piece of art can only be “consumed” by a single owner at a time, whereas a writer’s novel, for example, can be reproduced and sold to thousands of readers at once at marginally low costs.

¹³⁴ See *supra* notes 23–24 and accompanying text.

¹³⁵ See BRUNO S. FREY, *ART & ECONOMICS: ANALYSIS & CULTURAL POLICY* 30 (2d ed. 2003).

¹³⁶ See *id.* (citing as examples such artists as Rubens, Tiziano, Rembrandt, Lenbach, Stuck, Picasso, and Beuys).

¹³⁷ See Elliott C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC’Y U.S.A. 265, 281 (1992). It may warrant noting, however, that many artists are forced to work second jobs in addition to making art because it is difficult to make sales. Furthermore, many artists struggle to get paid by their gallerists, even when they have successful exhibitions, due to poorly managed galleries or questionable business practices.

¹³⁸ See Stephen E. Weil, *Resale Royalties: Nobody Benefits*, ARTNEWS, Mar. 1978, at 59.

Even among visual artists, the resale royalty is unevenly applied—as video artists and performance artists often live off grant money because their work cannot be sold, they would not benefit at all from resale royalties. But the work produced by these artists can be just as culturally significant as paintings and sculptures. If traditional artists are worthy of additional copyright-related protection, then so are these artists, but *droit de suite* fails to provide such protection.

Finally, today's art market is vastly different from that of early twentieth century France. Dealers now work on consignment rather than by attempting to “take advantage” of poor artists.¹³⁹ So contemporary art galleries set fair prices and artists receive market value for their work. Furthermore, artists are not solely responsible for their own success. Without gallery representation and a dealer's investments in their careers, artists have little hope of ever making a profit on their work. And when an artist retains a resale royalty right in each piece of art he sells, then buyers are likely to demand a discount on the original sale, reducing the profit for both the artist and the dealer. Therefore, awarding a royalty solely to artists hurts the dealers that put the artists in a position to profit at auction in the first place.

2. *Droit de Suite* Contradicts Common Law Copyright Doctrine and Property Rights

As will be discussed below, *droit de suite* fails to completely satisfy the traditional theories used to justify copyright.¹⁴⁰ *Droit de suite* fits more in line with the civil law personhood theory of copyright, if it fits within any theory at all. Utilitarianism, the theory most prevalent in common law nations, is based on the idea that copyright protection exists to incentivize authors to create culturally significant works.¹⁴¹ But *droit de suite* does not incentivize creation of work; it might even stifle creation.¹⁴²

¹³⁹ See Merryman, *supra* note 3.

¹⁴⁰ See *infra* Part III.B.

¹⁴¹ See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 9–13 (1994) (explaining that U.S. copyright law treats copyright rights like

Furthermore, droit de suite contradicts the well-established first sale doctrine, which extinguishes an author's right in a particular copy of a creative work once it is sold.¹⁴³ This doctrine is meant to prevent copyright protection from interfering with common law property rights—specifically, the free alienability of property.¹⁴⁴ A droit de suite would put a restriction on alienability. Such restrictions have been highly frowned upon by Anglo-American courts for centuries.¹⁴⁵ If legislators want to provide extra economic protections to one profession such as visual artists, they must consider what sets them apart from other producers. Should the royalty be extended to architects each time a building he designs is resold, or makers of furniture and other utilitarian design? Should a royalty be paid to a winery when its rare wine is sold at auction? And what about used car sales? Surely an automotive designer is proud of the creative work she puts into the car model she designs, but nobody would suggest that she deserves to be compensated each time the car is resold at a used car lot.¹⁴⁶ None of these craftsmen receive resale royalties because such a device would be a restriction on alienability, and free alienability is necessary to promote the most efficient use of property.¹⁴⁷

The manner in which art is consumed is more closely related to these goods than to literature or music, so there is no reason to conflate the value of art's intellectual property with the value of its physical property in order to create additional financial benefits only for visual artists. Doing so would be inconsistent with well-accepted common law property doctrine.

commodities and that alienability is necessary to reap the monetary rewards of intellectual labor).

¹⁴² See *supra* notes 112–14 and accompanying text.

¹⁴³ See *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 141–42 (1998) (discussing *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (holding that copyright cannot be extended beyond the first sale of a copy so as to place a restriction on subsequent alienations of the copy)).

¹⁴⁴ See *id.*

¹⁴⁵ See Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 568 (1991).

¹⁴⁶ Some commentators suggest the right would be good for the sale of used CDs and DVDs. See Ken Lovern, *Evaluating Resale Royalties for Used CDs*, 4 KAN. J.L. & PUB. POL'Y 113 (1994).

¹⁴⁷ See *id.*

3. Droit de Suite Wrongly Assumes Artists Cannot Protect Themselves

The unwaiveability and inalienability of droit de suite assumes artists are so naïve that they cannot bargain away their rights for value. All other economic intellectual property rights are assignable or waiveable because this gives authors bargaining power and maximizes an author's opportunities for income.¹⁴⁸ But droit de suite is traditionally unwaiveable and inalienable. Proponents of droit de suite suggest that this is necessary because of the unequal bargaining power between young artists and buyers.¹⁴⁹ But this viewpoint is based on an archaic understanding of the art market. Since the relationship between artists and dealers is now more symbiotic than predatory, artists have significantly greater bargaining power than they did in the early twentieth century.¹⁵⁰

In practice, the unwaiveability and inalienability of droit de suite acts as a forced investment. Consider the following likely scenario: a buyer who knows he retains less than 100% of a work's future resale value will perceive the current value of a work to be lower than if he were to retain the entire future resale value. That buyer will then pay less for the work that he values less. Theoretically, the artist can make up this difference *if* that work is ever resold for a profit on the secondary market—but the likelihood of any given work being resold on the secondary market is quite low. An unwaiveable droit de suite, then, essentially forces an artist to forego income on a first sale based on the speculation that his work will later increase in value and sell on the secondary market. But the young artist would realize a greater benefit from a higher sale price earlier in his career—when sales may not be as easy to come by—than he would from royalties later in his career when he is already successful. Moreover, if the work is never resold, the artist will never make that money back.

¹⁴⁸ See Netanel, *supra* note 141.

¹⁴⁹ See Merryman, *supra* note 3, at 123.

¹⁵⁰ See *supra* notes 51–56 and accompanying text.

Artists are not so naïve. In fact, some European artists who have the resale royalty right would rather it didn't exist.¹⁵¹ Currently, in the United States, an artist can choose to include a resale royalty in his contract of sale or he can choose to leave it out, but with an unwaivable droit de suite right in place, that artist could not sell 100% of the property interest in his work even if he wanted to.

4. Droit de Suite Primarily Benefits Those Who do not Need Additional Economic Protection

At bottom, droit de suite simply fails to improve upon the issues it was originally designed to address. After the collective agencies take their cut, most artists receive very little, if anything.¹⁵² And the artists that truly benefit from the right are the ones who need it the least.¹⁵³ Secondary market sales are rare for an average artist, and not to be expected until late in the artist's career.¹⁵⁴ Proponents of the right argue that "[e]ven a royalty of fifty dollars may allow an artist to purchase supplies sufficient to create her next work of art—or to pay the electric bill, allowing her to continue to create rather than devoting all her time and energy to finding another job."¹⁵⁵ The problem with this argument is that those artists who are devoting all their time to finding another job because they are not making sales on the primary market will not receive *any* royalty as there is no secondary market for unsuccessful artists. By the time an artist is successful enough to have her work sold on the secondary market she is likely making enough on primary sales to live quite comfortably. Droit de suite threatens to take money out of the pockets of young aspiring artists

¹⁵¹ See Patricia Cohen, *Artists File Lawsuit, Seeking Royalties*, N.Y. TIMES, Nov. 1, 2011, available at http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=1&_r=3 ("The arrival of [droit de suite] will do little or nothing for the vast majority of British artists. It will undoubtedly envelop the market, on which we as artists depend, in red tape, and it will discourage art dealers from buying particularly the work of emerging artists.").

¹⁵² See *supra* notes 86–95 and accompanying text.

¹⁵³ See *supra* notes 98–102 and accompanying text.

¹⁵⁴ See *supra* notes 57–59 and accompanying text.

¹⁵⁵ Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 40 J. COPYRIGHT SOC'Y 284 (1993).

when they need it most, and that is the opposite result lawmakers likely hope for.¹⁵⁶

B. Droit de Suite Under Three Theories of Copyright

Despite the policy considerations that weigh heavily against droit de suite, the resale royalty right has gained increasing acceptance since the 1960s. In previous scholarship, the policy debate is where the droit de suite discussion ended. An analysis of copyright theory and its relation to droit de suite should strengthen the opposition to the unsuccessful right.

While France's system of copyright is based on a personality theory,¹⁵⁷ the United States and other common law nations have traditionally justified copyright law with a utilitarian rationale.¹⁵⁸ Both of these systems of copyright have evolved over the years, however, and scholars now recognize that a mix of utilitarian theory and personality theory, as well as Lockean labor theory, justifies most copyright regimes.

A comprehensive awareness of how an intellectual property right fits within these theories aids lawmakers' ability to effect better intellectual property policy.¹⁵⁹ This section will briefly discuss each of the three most widely accepted theories of copyright and analyze droit de suite under each in order to show that lawmakers should resist creating droit de suite rights in nations that do not already have them.

¹⁵⁶ Assuming the original justification for the French droit de suite of providing additional income to poor artists is still the goal of the law, lawmakers would prefer to see young aspiring artists benefit over wealthy established artists.

¹⁵⁷ See *supra* notes 17–20 and accompanying text.

¹⁵⁸ See U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts”).

¹⁵⁹ William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 169, 194 (Stephen R. Munzer ed., 2001). Fisher describes how an analysis of intellectual property theory as it relates to the right of publicity has shown that the right of publicity is difficult to justify. As a result, what was once “a self-evident legal right, needing little intellectual rationalization to justify its existence” is now a significantly weakened right that is not as widely accepted. *Id.* at 195 (quoting J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.1[B][2], at 1–5 (1992)).

1. Personality Theory

Personality theory is based largely on the philosophy of Georg Wilhelm Friedrich Hegel.¹⁶⁰ Margaret Jane Radin has more recently tailored Hegel's philosophy to the context of intellectual property.¹⁶¹ Simply put, this theory suggests that an artist should own intellectual property in her creation because the work is an extension of the artist's self.¹⁶² Hegel writes that "[a]ttainments, eruditions, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them."¹⁶³ That is, expressions of the mind become property outside of the mind even though they might not be tangible "things."¹⁶⁴ Control of intellectual property in one's work is necessary "for self-actualization, for personal expression, and for dignity and recognition as an individual person."¹⁶⁵ Creation, and more importantly, ownership in what is created, is therefore a fundamental element of humanity and necessary for flourishing in life.

Unlike other theories, which try to equate intellectual property with tangible property, personality theory treats the two differently. Thus, the breadth of one's exclusive control over intellectual property under this theory may differ from that exercised over property such as land or chattels. In fact, Hegel himself disfavored exclusive control over tangible property but saw intellectual property as much more personal and therefore much more deserving of strong protection than real property.¹⁶⁶

Personality theory also differs from other theories of copyright in that it does not focus on the financial fruit of intellectual

¹⁶⁰ See generally G. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford University Press 1967) (1821).

¹⁶¹ See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

¹⁶² See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330–34 (1988).

¹⁶³ HEGEL, *supra* note 160, at ¶ 43.

¹⁶⁴ *Id.*

¹⁶⁵ Hughes, *supra* note 162, at 330.

¹⁶⁶ See *id.* at 334; see also *id.* at 348 (explaining that Hegel disfavored alienation of intellectual property rights, considering it to be morally analogous to slavery or suicide).

property. Instead, personality theory puts high value on moral rights such as recognition of a creator and maintaining the integrity of the work. Monetary gains from intellectual property are merely secondary, as Professor Justin Hughes explains: “[f]rom the Hegelian perspective, payments from intellectual property users to the property creator are acts of recognition [that] acknowledge the individual’s claim over the property, and it is through such acknowledgement that an individual is recognized by others as a person.”¹⁶⁷ Hughes goes on to state that “[e]ven for starving artists, recognition of this sort [respect, honor, and admiration] may be far more valuable than economic rewards.”¹⁶⁸

This is the theory of copyright under which *droit de suite* was born, and it is the theory in which *droit de suite* sits most comfortably. Under other theories of property and intellectual property, one may encounter opposition when attempting to collect a royalty on the resale of an object that has already been sold outright, but under personality theory, the idea that the object is an extension of the creator’s identity holds some weight.

But personality theory does not require that resellers go so far as to pay the artist a second time for the artist’s work—the theory is more concerned with moral rights such as ensuring that resellers properly acknowledge the creator. Receipt of monetary payment has only a very minor and indirect effect on the development of one’s personality.¹⁶⁹ Since *droit de suite* looks more like an economic right than a moral one, it is difficult to justify it under a theory that gives little appreciation to the monetary value of intellectual property.¹⁷⁰ This highlights a primary reason why many scholars are uncomfortable with accepting and promoting *droit de suite* (besides the fact that it is unlikely to work in practice)—it is an economic right founded on the principles of moral rights. This schizophrenia feels misplaced under whichever theory of copyright one may advocate. Furthermore, the monetary payment does nothing to protect the integrity of the artist’s work, and although it can be seen as an acknowledgement of the identity

¹⁶⁷ *Id.* at 349 (citing HEGEL, *supra* note 160, at ¶ 71).

¹⁶⁸ *Id.* at 350.

¹⁶⁹ *See id.* at 349.

¹⁷⁰ *See id.*

of the creator of the work, the caption in the auction house's catalog listing the artist's name is a simpler and more effective form of acknowledgment.

At bottom, the *droit de suite* does little to promote the goals of the personality theory of copyright. When a painting or other form of visual art is sold on the secondary market, the painting is valued *because* the work's integrity has been maintained and its creator is correctly identified—the sale alone (assuming it is a successful sale) promotes the dignity and recognition of the artist, with or without a pecuniary payment. To be fair, a royalty on that sale does nothing to harm the painter's personality, but due to its economic nature, it would be better to find justification elsewhere.

2. Utilitarian Theory

Utilitarian theory is the original basis for the progress clause in the U.S. Constitution,¹⁷¹ and has been embraced by the Supreme Court of the United States in *Fox Film Corp v. Doyal*.¹⁷² Under this theory, intellectual property rights are meant to maximize economic wealth by incentivizing the progress of science and useful arts. This incentive comes in the form of exclusivity, which gives the author an opportunity to exploit her own work without worrying about others trying to piggyback on her creativity. Judge Richard Posner and Professor William Landes explain that:

[a] distinguishing characteristic of intellectual property is its 'public good' aspect. While the cost of creating a work subject to copyright protection . . . is often high, the cost of reproducing the work, whether by the creator or by those to whom he has made it available, is often low. . . . Copyright protection . . . trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. . . . For copyright law to promote economic

¹⁷¹ See U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts").

¹⁷² 286 U.S. 123, 127–28 (1932) ("A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.'").

efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.¹⁷³

This is the foundation of utilitarian copyright theory. Copyright protection is meant to offset the “cost of expression.”¹⁷⁴ Without some exclusivity, the author would be unable to afford to create the work in the first place—and therefore would create nothing.¹⁷⁵

This theory requires a certain balancing act. Although greater protection is meant to create greater incentive for creation, it may also cause the price of works to increase, which could actually chill progress instead of promoting it.¹⁷⁶ Likewise, greater copyright protection decreases the value of copies of intellectual products because the buyer is restricted from using them in certain ways.

To justify *droit de suite* under the utilitarian theory, one must show that it encourages artists to create art and to move art forward. But evidence suggests it does the exact opposite—by cutting into the potential profits that can be realized on the secondary market, *droit de suite* theoretically drives down the primary market price of work created by young artists on the primary market and acts as a disincentive to create work.¹⁷⁷ Therefore, *droit de suite* disturbs the balancing act between rights of authors and rights of consumers, and as a result, it is difficult to justify *droit de suite* under the utilitarian theory.

Of course, it is not fair to ignore the evidence that suggests that a select few more established artists are likely to create more work as a result of *droit de suite*.¹⁷⁸ But the fact remains that the total amount of art expected to be produced with a *droit de suite* is less

¹⁷³ William J. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

¹⁷⁴ *Id.* at 327.

¹⁷⁵ See Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 854 (1993).

¹⁷⁶ See Fisher, *supra* note 159.

¹⁷⁷ See *supra* notes 113–14 and accompanying text.

¹⁷⁸ See *supra* note 114 and accompanying text.

than the total amount of art expected to be produced without it.¹⁷⁹ Furthermore, work by established artists is less likely to promote the progress of visual art than the work of young artists.¹⁸⁰ So even if droit de suite encourages creation and increases financial gain for some, it still fails to incentivize progress in art overall because it discourages creation for many.¹⁸¹

Proponents of droit de suite argue that a conclusion that the right would depress the prices of primary market sales is based on a model that assumes art buyers only buy art as an investment.¹⁸² But since many art collectors purchase art for its aesthetic appeal, and not for its investment value, a droit de suite should not impact primary market prices. However, this argument fails to recognize that even if most collectors buy for aesthetic appeal, they are still mostly shrewd businessmen. Whether or not the purchase is for investment purposes, a buyer is going to try to get the best price, and even the least sophisticated buyers can understand that partial ownership of a piece of art is not worth as much as full ownership of a piece of art. Accordingly, it is reasonable to accept the aforementioned economic model's conclusions regardless of why people buy art.

Additionally, droit de suite was conceived as a way to correct the lack of benefits artists received from copyright protection.¹⁸³ But artists may not even need such benefits because the market for

¹⁷⁹ See *id.*

¹⁸⁰ While it is difficult to say exactly what constitutes progress in visual art, we can be sure that stasis is not progress. Artists who have established themselves successfully enough to have a secondary market for their work are likely to continue to make more work similar to what made them successful and then eventually stop making work as they age. This pattern looks more like stasis than progress. In the fields of science and technology, progress is generally accepted as innovation, this is why patents require novelty. Likewise, in visual art, progress requires innovation, or a development of new expressions that build upon old ones. Most art galleries and dealers invest much of their efforts in discovering new artists with new ideas and new ways of thinking about art because these are the artists who move the industry forward. For one discussion of progress in art, see generally Henry F. Gilbert, *Progress in Art*, 6 THE MUSICAL Q. 159 (1920).

¹⁸¹ This statement is based only on economic models that may not, in fact, represent true behavior in the real world, but utilitarian copyright theory depends entirely on such economic models.

¹⁸² See *supra* note 115 and accompanying text.

¹⁸³ See *supra* notes 21–32 and accompanying text.

artwork differs from the market for easily copied intellectual products like books and music recordings.¹⁸⁴ That is, copying a book or a recording takes no creative talent or skill, and the process can be digitally automated, so these products are easily reproduced and distributed en masse, but copying a painting or sculpture requires the copyist to possess a certain degree of technique (though it does not require creativity).¹⁸⁵ As a result, legal copies of literary and musical works sell for very little while original paintings sell for very high prices. So the exclusivity of copyright protection is not likely a necessary incentive for a visual artist to create work. Similarly, increasing copyright protection by creating a resale royalty right is also unnecessary to incentivize the creation of art. Droit de suite therefore fails to fit within the bounds of utilitarian theory.

3. Labor Theory

Labor theory is based on the work of John Locke.¹⁸⁶ Locke suggests that property rights are derived from one's labor. The traditional interpretation¹⁸⁷ of Locke's theory states that since each individual at a minimum owns himself and his labor, therefore he also owns the fruit of his labor—that is, anything which he takes out of “the commons” (all that is in the world prior to being improved upon) and improves upon through his labor.¹⁸⁸ Rather than focusing on incentives to maximize wealth as under the utilitarian theory, the Labor theory suggests that an individual *deserves* to own the fruit of his labor—whether or not the ownership encourages progress of any kind.¹⁸⁹ Applied to

¹⁸⁴ See *supra* Part III.A.1.

¹⁸⁵ In *Bridgeman Art Library Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999), the United States District Court for the Southern District of New York explained that technical skill and effort required for slavishly copying a work of art do not amount to the “creative spark” required for copyright protection.

¹⁸⁶ See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689); see also Hughes, *supra* note 162, at 296.

¹⁸⁷ For another view, see generally Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer, ed., 2001).

¹⁸⁸ See LOCKE, *supra* note 186, at 2d treatise, § 85; see also Hughes, *supra* note 162, at 297.

¹⁸⁹ See Hughes, *supra* note 162, at 298.

intellectual property, this theory suggests that an author should have exclusive ownership of creative expressions, which are improvements on unexpressed ideas found in “the commons.”

An alternative understanding of Locke’s labor theory, however, suggests that Locke’s labor theory does not apply so easily to intellectual property.¹⁹⁰ For instance, Seana Shiffrin argues that Locke only endorsed private ownership if “things *of that sort* [are] susceptible to justified private ownership,”¹⁹¹ and some of Locke’s writings indicate that he opposed intellectual property rights because they are not the sort of things that ought to be owned privately.¹⁹²

Whether or not Locke approved of intellectual property may be irrelevant, though, as labor theory has evolved beyond Locke’s writings, and it is generally accepted as one possible justification for intellectual property.¹⁹³ Instead of focusing on whether Locke approved of such rights himself, one should ask why “labor upon a resource ‘in common’ entitle[s] the laborer to a property right in the resource itself?”¹⁹⁴ Fisher suggests that Locke provided a number of answers to such a question—some of which would provide strong support for intellectual property rights, and some of which would not.¹⁹⁵ This section adopts the traditional viewpoint that intellectual property can be justified by labor theory, but acknowledges that such a viewpoint may not be the strongest understanding of Locke’s treatises.

Much like utilitarian theory, Locke’s labor theory recognizes the balancing act between the property rights of the creator and the rights of others. The theory sets two provisos on ownership of

¹⁹⁰ See generally Shiffrin, *supra* note 187 (interpreting Locke’s theory of private appropriation as not endorsing appropriation of most intellectual products).

¹⁹¹ See *id.* at 143.

¹⁹² See *id.* at 154.

¹⁹³ See Fisher, *supra* note 159, at 184 (stating “whether Locke’s theory provides support for any intellectual property rights is uncertain”); see also Hughes, *supra* note 162, at 300 (explaining that the Lockean explanation of intellectual property has immediate, intuitive appeal and has been accepted by many).

¹⁹⁴ Fisher, *supra* note 159, at 182.

¹⁹⁵ See *id.* at 183 (referring to six different rationales found in the *Second Treaties*, and pointing to certain of these rationales to make a stronger or weaker argument for intellectual property rights).

property: (1) one's property (the fruit of his labor) must be included in the commons for others to improve upon unless removing it would leave "enough and as good" in common for others to use; and (2) property should not be wasted.¹⁹⁶ These conditions suggest that intellectual property rights should not be so great as to interfere with the rights of others. But Locke provided little guidance as to the proportionality of these rights, which leaves plenty of room for debate.¹⁹⁷

At first glance, it may seem as though *droit de suite* works under this theory—that artists deserve increased economic rights in their artwork because of the labor they put into developing their work and their reputation. However, justifying *droit de suite* under labor theory would require a conflation of tangible property with intellectual property. A painting or a sculpture is the fruit of the artist's labor and therefore, she owns the physical art object as tangible property as well as the expression of the idea in the form of intellectual property—that is, as long as ownership of such things satisfies Locke's two provisos. However, the rights of others must limit the artist's rights. When the artist sells an art object to a buyer, that buyer compensates the artist by giving the artist the fruit of *his* labor.¹⁹⁸ If the market has its way, this exchange is a trade for fair value. So if the artist is able to continue to exert control over the art object, she is interfering with the buyer's right to fully exploit the fruit of his own labor (which is now the art object by way of trade). Even though the artist may retain control of the intellectual property in the art, she has yielded her right in the tangible object to the buyer through the original sale. That is, the artist may *deserve* any increase in the pecuniary interests in the intellectual property in the art that results from the labor she put into developing her reputation, but that does not directly translate into a right to appropriate gains in the value of the physical property she has already sold for fair value.

Furthermore, retaining a future interest in the art in the form of a resale royalty right would likely be wasteful, violating Locke's

¹⁹⁶ Shiffrin, *supra* note 187, at 146–47.

¹⁹⁷ See Fisher, *supra* note 159, at 189.

¹⁹⁸ Locke favored use of money in such exchanges because money reduces waste, thereby satisfying the second proviso. See Shiffrin, *supra* note 187, at 150.

second proviso. As discussed above, applying the droit de suite creates great administrative burdens, and the benefits that artists receive are reduced when collective management agencies take their fee.¹⁹⁹ Additionally, as a restraint on alienation, a droit de suite would reduce the likelihood that the physical property will be exploited in the most efficient manner.²⁰⁰ This translates into waste.²⁰¹ Accordingly, under labor theory, the artist's right to privately own his artwork hardly justifies attaching a resale royalty to the physical art object.

The question, then, is whether control of the intellectual property in the art derived from the labor of creation entitles the artist to a resale royalty. But the artist only sells the physical object to the buyer, and the physical object is all the buyer wishes to resell. The artist does not *deserve* anything more because she has already extinguished her own rights in the physical property even though she has retained the intellectual property. Of course, one might argue that the artist's labor in creating additional quality work causes the value of her sold work to increase and therefore she has improved upon that work. But she could not have actually improved the tangible object, as it has not been in her possession after the first sale, so she has merely improved her own reputation. The artwork is still wholly the physical property of the buyer—instead, she owns the fruit of her labor in the form of the new work she will continue to create, which will be sold at higher prices.²⁰² She *deserves* nothing more.

¹⁹⁹ See *supra* notes 85–93 and accompanying text.

²⁰⁰ See *supra* notes 144–47 and accompanying text.

²⁰¹ This concept may seem fairly abstract when applied to art, as “exploiting art” essentially means looking at it, or even just owning it in the case of an art investor. However, if the art is not owned by the individual who values it most (and therefore is willing to pay the most for it), then it is not being exploited in the most efficient manner. The droit de suite acts as a transaction cost that could potentially prevent the most efficient result. For a discussion of how transaction costs lead to waste, see generally R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (establishing the Coase Theorem which holds that bargaining results in the most efficient outcome when transaction costs are absent).

²⁰² See Gregory, *supra* note 56, at 188 (discussing the successful auction at Phillips de Pury of a piece by artist Jacob Kassay, who was then represented by Eleven Rivington, a lower east side New York art gallery: “Kassay did not directly benefit from his Phillips triumph, of course—only the seller and the auction house did. But Eleven Rivington

In sum, the only theory of copyright that really comes close to supporting *droit de suite* is the personality theory, and even that theory has its shortcomings on the matter. Granted, *droit de suite* could theoretically be justified as a non-intellectual property right, but since its inception early in the twentieth century, it has been intended to correct a perceived shortfall in copyright protection for visual artists.²⁰³ And outside the realm of intellectual property, *droit de suite* still acts as a restraint on alienation. Without strong justification under any of these theories, *droit de suite* is incompatible with systems of law that justify their copyright regime under any of these theories. Further, the right creates inconsistencies with little, if any, benefit for young artists. Coupled with the fact that *droit de suite* has failed to work as hoped in practice, it makes little sense to continue pushing for *droit de suite* laws in the international community.

C. *Alternatives to Droit de Suite*

Assuming the issues that *droit de suite* aims to correct actually require correction, implementing civil law style *droit de suite* is not the only option. Artists can contractually obligate a buyer to pay a royalty upon resale—knowing full well that this decreases the initial sale price—and occasionally they do.²⁰⁴ This allows artists to decide if they want a resale royalty or not. Critics might argue that artists are not in equal bargaining power with their buyers and so this is not a viable option, but artists have the backing of their dealers who have stronger bargaining power.

Similarly, a *droit de suite* law that allows the right to be waived would give the artist the option of whether or not she wants to enjoy the right. However, the same unequal bargaining argument applies here as with leaving resale royalties up to contractual negotiations. But a waiveable and alienable *droit de suite* would fit more comfortably amongst the other rights of copyright holders in

responded by raising his prices, and those prices remain high. When things go as well as they have for Kassay, everyone winds up happy.”).

²⁰³ See *supra* notes 21–26 and accompanying text.

²⁰⁴ Boyd, *supra* note 102.

common law nations.²⁰⁵ This arrangement would make the right easier to justify under the utilitarian theory, as it could eliminate the problem of decreased primary market prices that theoretically results in less production of art by less established artists. When droit de suite was originally imagined, it was made unwaivable and inalienable because it was considered to be a moral right that derived from the personhood theory of copyright. But considering the pecuniary benefits the right is designed to create, it makes more sense to treat droit de suite as an economic right like the right of reproduction and the right of performance or display. Making the right waivable and transferable would also mitigate the conflicts with property law and the free alienability of property, and therefore make it easier to justify under the labor theory of copyright.

Another alternative to droit de suite would be increased display-based rights for artists. In its report on droit de suite in 1992, the U.S. Register of Copyrights suggested that broader display rights might be a better idea than a resale royalty right.²⁰⁶ Currently, U.S. copyright law provides a right of display that is extinguished by the first sale doctrine.²⁰⁷ A modification of this law that grants special display rights to visual works of art could be crafted to require museums and galleries to pay the artists to show the work. Such a right would be similar to the right of performance enjoyed by playwrights and musicians and would not put a restraint on alienation in the way that droit de suite does. Furthermore, this would fit more comfortably within an intellectual property regime because the display of an image is more closely related to the intellectual property in the image than to the physical art object. It would not likely have the same detrimental effect on the price of art on the primary market as droit de suite opponents expect, so it seems more likely to promote progress through

²⁰⁵ See Merryman, *supra* note 3, at 123–24 (explaining how making the droit de suite unwaivable undercuts democratic law, by imposing legal protection even against the authors will).

²⁰⁶ See generally U.S. COPYRIGHT OFF. REG. OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY (1992).

²⁰⁷ 17 U.S.C. §§ 106(5), 109 (2006) (“[T]he owner of a particular copy . . . is entitled, without the authority of the copyright owner, to display that copy publicly . . . to viewers present at the place where the copy is located.”).

increased production of art. However, this might be detrimental to the public through increased museum entrance costs and the negative side effects should be carefully analyzed before seriously considering such an option.

CONCLUSION

Despite strong evidence that *droit de suite* laws fail to provide most artists with greater economic security and may in fact be a burden for most artists, providing such a right to artists is becoming more common in global copyright regimes. With full implementation throughout the European Union now in effect, the pressure for other nations to implement the right will continue to increase. But *droit de suite* has never lived up to the expectations of lawmakers. The right fails to benefit the individuals it means to—starving artists and their starving heirs—and instead benefits the few rich artists who dominate the secondary art market and the administrative agencies and bureaucracies that oversee the distribution of royalties. Furthermore, *droit de suite* is an alien concept to Anglo-American common law, and it contradicts several well-established doctrines.

All nations that do not already enforce a *droit de suite* should be wary of the political pressure to do so regardless of which theories of intellectual property they use to justify their copyright systems. *Droit de suite* has an economic focus that is hardly a true concern of the personality theory; it fails to incentivize progress in art or benefit most artists monetarily as the utilitarian theory requires; and it provides a right beyond the confines of labor theory by interfering with the buyer's right to control his property while failing to minimize waste by introducing inefficient transaction costs. Though a *droit de suite* law surely has good intentions, it would likely do far more harm than good for both creators of cultural heritage and the public at large that benefits from the creative work.